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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LAUREL SAND & GRAVEL, INC.,
Petitioner
v.
CSX TRANSPORTATION, INC. and
MARYLAND MIDLAND RAILWAY, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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The crux of the decisions below, making them worthy of review by this Court, is their extension of *Monsanto*'s and *Matsushita*'s summary-judgment methodology to undermine well-established substantive principles of antitrust conspiracy law. CSX' Brief in Opposition makes no attempt to reconcile the lower courts' analysis with those principles; indeed, it barely acknowledges them, turning the same blind eye as the courts below to antitrust conspiracy doctrines as venerable as the Sherman Act itself.

The case thus squarely presents the issue of what constraints, if any, those doctrines impose on lower courts seeking to implement the broad principles enunciated in *Monsanto* and *Matsushita*. CSX' protestations notwithstanding, the conflict among the circuits on this issue is

plain. While other courts of appeals—in *Chevron*[1] and the other cases cited in the petition for certiorari (at 17-18 & n.36)—have reaffirmed and continue to respect traditional conspiracy doctrines when considering antitrust summary judgment motions, the Fourth Circuit evidently has deemed them superseded.

The issue is squarely presented here, notwithstanding the supposed "additional reason" (Pet. App. 36a) given by the courts below for dismissing petitioner's claim without trial—lack of "antitrust standing" to bring the action —for the simple reason that the challenge to petitioner's standing is without merit. CSX' Brief in Opposition points to nothing that could justify the lower courts' attempt to force this case into the *Illinois Brick* mold.[2] Indeed, certiorari would be warranted if only to quash the rulings below that *Illinois Brick*'s "indirect purchaser" rule should be extended to non-"overcharge" cases.

I.

Contrary to CSX (Brief in Opp. 2), petitioner LSG did *not* "fail[] to uncover any direct evidence of the alleged CSXT/Millville conspiracy." Nor did the courts below broadly find, as CSX now suggests, that "there was no evidence from which it could be inferred that CSXT's conduct, including its refusal to rent its tracks to MMR, was the product of a conspiracy" (Brief in Opp. 8).

The district court found quite the opposite. It found "showings by the plaintiff of agreements between CSX and Millville Quarry, Inc. that well could be found at

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[1] *In re Coordinated Pretrial Proceedings In Petroleum Prods. Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991). This Court's recent denial of certiorari in *Chevron*, in which the Ninth Circuit took such a different tack than the Fourth Circuit in the instant case, only increases the uncertainty that currently prevails.

[2] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

trial to be illegal restraints of trade" (Pet. App. 16a).[3] The restraint of trade shown by LSG was in essence a conspiracy to exclude competition for Millville, CSX' established customer, by using CSX' market power over the required rail transportation to raise prospective rivals' transportation costs to prohibitive levels.[4] It was only a single act—CSX' refusal to offer LSG economically practicable and efficient rail service in any form, whether trackage rights for MMR, joint line run-through interchange service,[5] or indeed "*any* proposal" (A. 596, em-

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[3] At oral argument on CSX' summary judgment motion, after reviewing the written record, the district court acknowledged that LSG had established "a factual background or history which is a very difficult history to defend" (A. 1007)—a history that, as the court recognized, "relates to his excluding you in a conspiracy with CSX from the aggregate market" (*ibid.*), including "a lot of transactions that don't look good" (A. 968).

[4] *See, e.g.*, Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986).

[5] Ordinary joint line interchange service involves hauling of loaded cars by one railroad, using its own locomotives, to its point of interchange with the second railroad, where they are picked up by the second railroad's locomotives for hauling to the destination. On the back-haul the process is reversed. "Run-through interchange" joint line service involves interchanging an entire train (such as the "unit train" contemplated by LSG), including not only the loaded cars but also the locomotives themselves, which "run through" the entire haul with only a crew change at the interchange point. *See* A. 211-12, 308.

The economic efficiencies of "run-through interchange" service arise from the fact that only one set of locomotives to which each participating railroad contributes (A. 213-14), rather than a separate and duplicative set provided by each railroad for its own portion of the haul, need be dedicated to the back-and-forth "unit train" service involved. *See* A. 308-10 ("[i]t's a question of using three locomotives or six"). For short hauls of low-value commodities such as in this case (68 miles total over both railroads), "run-through interchange" or comparable service that avoids underutilization of dedicated locomotives is the only economically practicable arrangement (*see* A. 319) (testimony of LSG's expert railroad economist).

phasis added)—that the district court deemed unconnected to a conspiracy by any "direct evidence." And that act came directly on the heels of the series of CSX actions that (according to the court) could well have been found by a trier of fact to be conspiratorial.

Under the substantive principles of antitrust conspiracy law described in the petition for certiorari (Pet. 17-20), a finding that there was an anticompetitive CSX/Millville agreement as described by the district court would have provided ample basis for a trier of fact to conclude (1) that CSX' refusal to provide LSG with any form of economically practicable rail service was likewise a product of the conspiracy, and (2) that the conspiracy therefore directly injured plaintiff.[6] The sole

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[6] It is untruthful for CSX to represent (Brief in Opp. 5) that LSG's damages expert "concluded that LSG's alleged injuries depended entirely upon the presumption . . . [of] a trackage rights arrangement" and "recogniz[ed] the economic infeasibility of joint line rail service to LSG's quarry," and equally so to imply that LSG's counsel ever disclaimed all "other damages" (*ibid.*). The expert report cited by CSX (A. 58, at 61-62) stated only that the author had included a hypothetical "trackage rights" charge in the "transportation cost" component of his lost-profits calculation for LSG because the particular joint line rate of $2.95 offered by CSX was not "economically viable" and the LSG/MMR last-ditch request for "any proposal" (A. 596) had specifically mentioned trackage rights. *See* A. 61. Not one word in the cited damages report addressed either the necessity of trackage rights or the "economic feasibility" of joint line service in any form, much less under a "run-through interchange" arrangement.

In point of fact, the *only* evidence on that score was the unrebutted testimony of LSG's expert in railroad economics (Dr. Richard Levin of Yale) that joint line service for LSG using a run-through interchange would have been feasible, not subject to legitimate CSX objection, and offered by any railroad that wanted to move the traffic (A. 308-09, 321). Tellingly, even now CSX makes no effort to deny this, responding only that LSG did not ask for the appropriate form of service with sufficient specificity (Brief in Opp. 10 n.9).

As for LSG counsel's alleged disclaimer of non-trackage rights damages, for which CSX provides no citation, we presume CSX

contrary evidence presented by CSX to the summary-judgment court was the conclusory post-deposition affidavit of Yocum, the CSX functionary alleged by CSX to have been the decision-maker.[7] CSX points to nothing in the opinion of either the district court or the court of appeals gainsaying their patent failure, apparently in the belief that *Monsanto* and *Matsushita* forbade it, to consider " 'the whole picture' " (*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)), "looking at it as a whole" (*United States v. Patten*, 226 U.S. 525, 544 (1913)) in determining whether that one conclusory affidavit was enough to foreclose LSG under Fed. R. Civ. P. 56 from even going to trial.

II.

CSX defends the *Illinois Brick* rulings of the courts below by pointing to three court of appeals decisions not involving alleged "indirect purchasers" that establish, it

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refers to counsel's representation that at trial LSG would claim only the lost profits on sales it was unable to make by reason of its conspiratorial exclusion from the aggregates market as calculated in the above-cited expert damages report (plus, assuming its ultimate entry as a result of this litigation, the additional start-up costs resulting from the conspiratorially-caused delay). Matovcik Dep. Tr. 451-52 (not reproduced in the Joint Appendix below). All that was "disclaimed" was still another but as-yet-uncalculated component of damages, representing the increased costs of constructing physical access to CSX' main line necessitated by CSX' grant to Millville of exclusive access via the existing "wye" track. This is a far cry from a disclaimer of all non-trackage rights damages, as CSX would have it.

[7] While CSX characterizes Yocum's affidavit as "unrebutted" (Brief in Opp. 11), LSG presented extensive evidence of meetings and memoranda surrounding his decision that threw his conclusory denials into sharp question (*see* Pet. 10 & n.25). Moreover, as noted above, the affidavit was filed only *after* Yocum's deposition had been taken. He was never exposed to cross-examination on its consistency with the evidence presented by LSG, much less to an evaluation of his credibility by the trier of fact.

says, that the "rule limiting antitrust standing to directly injured parties is not confined to cases involving an illegal 'overcharge' " (Brief in Opp. 14). True enough as a general principle,[8] but the sole basis for the rulings below was the particularized manifestation of that principle in *Illinois Brick* denying antitrust standing virtually *per se* to indirect purchasers of price-fixed goods. As noted in the petition for certiorari (at 25), this Court has strictly confined its *Illinois Brick* holding to indirect purchasers suing to recover an overcharge.

Applying the general principle on its own terms, without regard to its *per se* applicability to indirect purchasers in overcharge cases, petitioner LSG, as the focus of the CSX/Millville conspiracy, plainly had antitrust standing. The only proper question, as CSX surprisingly seems to agree (Brief in Opp. 16), is whether LSG was "injured in [its] business or property by reason of" the CSX/Millville conspiracy within the meaning of Section 4 of the Clayton Act (15 U.S.C. § 15). The injury inflicted by that conspiracy on LSG—the conspiracy's intended victim—could not have been more direct.[9] Under Section 4 as authoritatively construed in *Blue Shield of Virginia* and *Associated General Contractors*,[10] LSG's

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[8] We note also that, contrary to CSX, the football-player plaintiffs in *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338 (5th Cir. 1988) were *not* held to lack antitrust standing (845 F.2d at 1343); the court expressly declined to decide the "standing" issue, proceeding instead to decide (and dismiss) the players' claims on the merits.

[9] LSG, a prospective shipper, requested and was denied economically practicable and efficient transportation service by CSX, a connecting line-haul carrier. The court of appeals' attempt to distinguish this injury by labeling it "indirect," invoked by CSX as "critical" (Brief in Opp. 15-16), is not a distinction but a mere conclusion.

[10] *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

antitrust standing to complain of its exclusion from the aggregates market was unquestionable.[11]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[11] As CSX observes (Brief in Opp. 15), *Blue Shield of Virginia* establishes that being the "focus" of a conspiracy is not essential to antitrust standing, but this does not mean that being the focus is irrelevant.